

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

KARL F. THOMPSON, JR.,
Defendant.

No. CR-09-88-FVS

ORDER DENYING THE
DEFENDANT'S MOTION TO
DISMISS THE INDICTMENT,
OR, IN THE ALTERNATIVE,
GRANT A NEW TRIAL

THIS MATTER came before the Court on August 31, 2012, for oral argument based upon the defendant's "Motion to Dismiss the Indictment with Prejudice; or Alternatively, Motion for a New Trial" (ECF No. 907). The defendant was represented by Carl J. Oreskovich, Courtney A. Garcea, and Stephen M. Lamberson. The United States was represented by Aine Ahmed, Joseph H. Harrington, and Timothy M. Durkin.

BACKGROUND

The defendant was a City of Spokane Police Officer. On March 18, 2006, he received information from a dispatcher indicating a man had approached and frightened a young woman who was withdrawing money from an ATM while sitting in her car. The young woman left the ATM without cancelling the transaction that was in progress. She suspected the man stole money from her bank account. She said he ran down the street and entered a convenience store. The defendant confronted the

1 man in the store.

2 The owner of the convenience store had installed security cameras
3 in order to deter shoplifters. Each camera points in a different
4 direction. The cameras take pictures in sequence. First camera one
5 takes a picture, then camera two, then camera three, then camera four
6 -- and then a new cycle begins again. The cameras complete
7 approximately four cycles each second.

8 The man who frightened the young woman was named Otto Zehm. Mr.
9 Zehm entered the convenience store at 18:25:59 on the clock that is
10 utilized by the store's camera system. The time 18:25:59 is "military
11 time" for 6:25 p.m. plus 59 seconds, *i.e.*, almost 6:26 p.m. The
12 store's cameras were taking pictures as he entered. Together, the
13 four cameras recorded approximately 16 frames per second. As each
14 picture was taken, it was electronically stamped with a time, *e.g.*,
15 18:26:59. Since each camera took three or four pictures per second,
16 each of the three or four pictures taken by that camera during a
17 particular second may bear the same time stamp.
18

19 The time stamps require further explanation. The store's camera
20 system has an internal clock. The clock runs two minutes and three
21 seconds faster than Pacific Standard Time. Thus, when one looks at a
22 time stamp, one must determine whether it refers to "convenience store
23 time" or Pacific Standard Time. If the latter, one must add two
24 minutes and three seconds in order to compare it to the equivalent
25 time on the convenience store clock.

26 The defendant entered the store approximately ten seconds after

1 Mr. Zehm. The defendant walked briskly toward the section of the
2 store where Mr. Zehm was standing. As the defendant did so, he
3 withdrew his baton from its holder on his belt. There is an image of
4 him holding his baton in front of him. The image is stamped 18:26:11.
5 At 18:26:12, Mr. Zehm turned and faced the rapidly approaching
6 defendant. Mr. Zehm was holding a two-liter pop bottle in front of
7 himself. One hand was on the neck of the bottle; the other on its
8 base. A complex encounter began. Greatly simplified, the record
9 reflects the following: Mr. Zehm backed away as the defendant pressed
10 forward. The defendant struck Mr. Zehm with his baton. After the
11 first or second blow, Mr. Zehm fell backwards to the floor. The
12 defendant continued to strike Mr. Zehm with his baton as Mr. Zehm
13 attempted to wriggle away from him along the floor. The defendant
14 tried to immobilize Mr. Zehm with electric shocks from his Taser. He
15 was unsuccessful. A second police officer arrived and began assisting
16 the defendant. Other officers joined them. The defendant withdrew
17 from the struggle. Eventually, the other officers restrained Mr.
18 Zehm. He stopped breathing. Paramedics attempted to resuscitate him.
19 Their efforts were partially successful. They transported him to a
20 local hospital, where treatment continued. However, his brain had
21 been damaged, and the damage could not be undone. He was pronounced
22 dead a few days later.

24 City and county authorities began an inquiry. Investigators
25 interviewed the defendant on March 22, 2006. They offered him an
26 opportunity to watch the video recordings of the confrontation before

1 giving a statement. He declined the offer. He proceeded to give a
2 statement to the investigators.

3 The interview was recorded with some type of audio recorder and
4 the audio recording was transcribed. The defendant reviewed the
5 transcript and approved it. The transcript is over 34 pages long.
6 The defendant described the opening seconds of the confrontation. He
7 said he was holding his baton when he approached Mr. Zehm. (Statement
8 of Karl Thompson at 17-18.) Mr. Zehm turned to face him. Mr. Zehm
9 was holding a two-liter pop bottle in a manner the defendant described
10 as "tense":

11 We were both staring at each other. When I came to a stop,
12 I immediately told him, I ordered him, in a, in a forceful
13 voice, drop it. He immediately replied, and during this
14 short discourse, we both did not break eye contact. His
15 eyes were wide. He was looking straight at me.

16

17 And I was in full uniform. . . . he said "why?" It was a
18 forceful response. Uh, it, he didn't break eye contact and
19 my first impression was, here I am in full uniform. I'm
20 displaying a baton in a manner that shows I'm prepared to
21 strike. I'm ordering him to drop the bottle which he's
22 holding at chest level in both hands and I he, he tells me
23 why. And I immediately I said "drop it now." I said it
24 twice as loud and he said "no." It was again looking
25 straight at me, clearly without any provocation, that was
26 his response. In my mind at that point, in our proximity,
my belief was that he was preparing to assault me. When he
turned around and saw me entering, he, he did not
immediately flee. He picked up an object and it was held in
a manner that I realized was in a position that he could use
it as a significant weapon against me.

1 *Id.* at 18.

2 Besides taking a statement from the defendant, investigators
3 considered the video recordings of the confrontation that were taken
4 by the four security cameras. Many of the events that are relevant to
5 this case occurred between 6:20 p.m. and 7:00 p.m. The security
6 cameras were whirring throughout that 40-minute period. Experts have
7 separated the frames so each image may be viewed separately. There
8 are hundreds of separate frames that are potentially relevant to this
9 case. Each frame has a number. One way to identify a frame is to
10 examine its frame number and the number of the camera that recorded
11 it. Another way to identify a frame is to examine the time that's
12 "stamped" on the frame.

13 The frames are stored in a format that is sometimes referred to
14 as Motion JPEG or M-JPEG. (The acronym "JPEG" stands for Joint
15 Photographic Experts Group.) The M-JPEG format has advantages and
16 disadvantages. A disadvantage is it reduces the size of each image it
17 stores by eliminating information. The compression of data may
18 distort the image the viewer observes. The viewer may see things in
19 the image that really weren't present in the scene that was recorded.
20 Such distortions are sometimes referred to as "compression artifacts."
21 Given the existence of compression artifacts, discernment is required
22 in interpreting images that are stored in the M-JPEG format.

23 Grant Fredericks is an expert in interpreting M-JPEG images.
24 During the summer of 2006, he was hired to interpret the images that
25 were recorded by the security cameras in the convenience store in
26

1 which the confrontation occurred. He completed a written report
2 during September. Near the end of the report, he summarized his
3 findings. Among other things, he concluded the video recording shows
4 the defendant struggling with Mr. Zehm for approximately one minute
5 thirteen seconds before one can see him use his baton. At that point,
6 one can see him swing his baton eight times in six seconds.

7 By the fall of 2006, a federal investigation of the confrontation
8 was underway. An Assistant United States Attorney ("AUSA") and an
9 Federal Bureau of Investigation ("FBI") Special Agent led the federal
10 investigation. They read the defendant's statement, and they read the
11 statements of persons who had observed the confrontation. They
12 examined the security camera recordings, and they read Mr. Fredericks'
13 report. They were very skeptical of his conclusions. Consequently,
14 they interviewed him on March 8, 2007. He brought a laptop computer
15 to the meeting. He used a software package to display images of the
16 confrontation between the defendant and Mr. Zehm. The AUSA and the
17 FBI Special Agent challenged Mr. Fredericks' interpretation of a
18 number of images, especially images that had been recorded at the
19 beginning of the confrontation.
20

21 Following the March 8th meeting, the FBI Special Agent prepared a
22 report. On page three, she describes Mr. Fredericks' comments
23 concerning the opening seconds of the confrontation between the
24 defendant and Mr. Zehm:

25 Frames 18:26:10 through 18:26:18 . . . were reviewed in
26 detail. [I] . . . reviewed frames with Frederick [sic] who
agreed that [the defendant] moved the baton from his left

1 hand to his right hand as he walked down the aisle of the
2 store.

3 [I] . . . then showed Fredericks frame by frame in
4 18:26:14 . . . where [the defendant] appeared to hold his
5 baton upright in his right hand and then subsequently swing
6 his baton down toward Zehm in a forward motion. Fredericks
7 initially advised that the image may be something other than
8 a baton such as a shadow or a video artifact. Upon further
9 review of the frames however, Fredericks agreed that the
10 images depicted in 18:26:14 and 18:26:15 were consistent
11 with a baton strike(s) and agreed that [the defendant]
12 appeared to be using his baton in a forward striking motion
on at least two occasions prior to the images depicting Zehm
on his back holding the Pepsi bottle. Fredericks admitted
that he appeared to have missed these images during his
initial review of the video.

13 (ECF No. 915.)

14 The FBI Special Agent and the Assistant United States Attorney
15 next met with Mr. Fredericks on August 3, 2007. One of the purposes
16 of the meeting was to discuss "still" images of the confrontation that
17 Mr. Fredericks had prepared at the FBI Special Agent's request. Some
18 time during the August meeting, Mr. Fredericks offered to prepare a
19 supplemental report clarifying his position. The AUSA and the FBI
20 Special Agent accepted his offer. Mr. Fredericks completed his
21 supplemental report during September.
22

23 Mr. Fredericks' supplemental report analyzed a number of images
24 that capture the initial seconds of the confrontation between the
25 defendant and Mr. Zehm. Mr. Fredericks used Pacific Standard Time
26 ("PST") in his report. As explained earlier, one must add two minutes

1 and three seconds to PST in order to convert it to convenience store
2 time. Mr. Fredericks opined that the defendant's baton is not visible
3 in an image which is stamped 18:24:11 PST (18:26:14 on the convenience
4 store clock), but that it is visible in images which are stamped
5 18:24:12 PST (18:26:15 on the convenience store clock) and 18:24:13
6 PST (18:26:16 on the convenience store clock). Although Mr.
7 Fredericks identified certain images in which the defendant's baton is
8 visible, he said nothing about the images being consistent with a
9 swinging motion.

10 Mr. Fredericks was not the only expert who was helping the United
11 States interpret the video recordings. Another was Richard Gill,
12 Ph.D., an expert in human factors engineering. Dr. Gill completed a
13 report on January 31, 2008. He concluded the first baton strike
14 occurred at 18:26:14, and it is depicted in frames 68-70. (Report Re:
15 Otto Zehm Investigation at 21-22.) The image Dr. Gill referred to as
16 "frame 69" is one of the images Mr. Fredericks discussed at length
17 with the Assistant United States Attorney and the FBI Special Agent
18 during the course of their meetings in March and August of 2007. Dr.
19 Gill's report strongly implies, if it does not actually state, he
20 thought he could see the defendant's hand, arm, and baton in frame 69.
21 *Id.* at 21, 22, 25, 26. Dr. Gill's determination concerning the timing
22 of the first baton strike had significant implications. Mr. Zehm
23 turned to face the defendant at about 18:26:12. The defendant said he
24 stopped and issued two commands to Mr. Zehm, both of which Zehm
25 allegedly defied, before he struck Zehm with his baton. If, as Dr.
26

1 Gill concluded, the first baton strike occurred at 18:26:14, then only
2 two and 1/4 seconds elapsed between the time the defendant allegedly
3 issued his commands and the time he allegedly struck Mr. Zehm. Dr.
4 Gill doubted the defendant had time to issue two commands, and Mr.
5 Zehm had time to defy them, in such a brief period. In other words,
6 Dr. Gill's calculations undermined the credibility of the defendant's
7 version of the opening seconds of the confrontation.

8 On May 13, 2009, Mr. Fredericks testified before a grand jury.
9 He showed a number of images of the confrontation to the grand jurors,
10 analyzing the images in response to questions from an Assistant United
11 States Attorney. When Mr. Fredericks reached images that are stamped
12 18:26:13 and 18:26:14, the AUSA asked, "And is the movement that we're
13 seeing here and as you described, is that consistent with the movement
14 of a forward overhand baton strike?" Mr. Fredericks answered, "It
15 is." (Transcript of the Testimony of Grant Fredericks before the
16 Grand Jury (ECF No. 916) at 30.)

17 The AUSA also asked questions about images that are stamped
18 18:26:15 and 18:26:16. One of the images shows the defendant holding
19 a baton in front of himself at roughly a 45° angle. He is facing Mr.
20 Zehm in the south aisle of the store. The AUSA asked Mr. Fredericks a
21 question that reflected Dr. Gill's interpretation of this image:
22

23 Q. And we know from reviewing Camera Angle No. 1 that
24 the baton is caught after the first baton strike,
25 and it's caught in an upward strike position with
26 forward movement by Officer Thompson at
approximately 18:26:15; is that correct?

1 A. Yes. There's a number of images that show the
2 baton in the air at that time, yes.

3 *Id.* at 38.

4 On May 22, 2009, Mr. Fredericks testified in a federal criminal
5 trial in the State of New York. He was cross examined by AUSA Anna
6 Skotko about his analysis of the Thompson-Zehm video recordings:

7 Q. Are you aware the FBI launched an investigation
8 [into the death of Otto Zehm] and you changed your
9 mind about what the video showed?

10 A. No. That's not true at all.

11 A. No.

12 Q. In your initial report that you gave to the
13 Spokane Police Department, that was incorrect
14 wasn't it?

15 A. No.

16 Q. It was not incorrect?

17 A. No, not at all. The FBI asked me if I would
18 pursue specific focus on one specific area as
19 opposed to multiple videos over a long period of
20 time. So they wanted me to focus on one area,
21 flush [sic] that out. But there's no
22 inconsistency.

23 Q. In that report you concluded that the officer did
24 not hit the mentally disabled individual with the
25 baton?

26 A. Absolutely not, no. No, I concluded the baton,
the video did not show the baton striking the
individual. Significantly different than whether
he hit him.

(Transcript of the Testimony of Grant Fredericks in *United States v.*
Simoes (ECF No. 964) at 55-56.)

The defendant was indicted on June 19, 2009. Count One alleged
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1 he willfully deprived Mr. Zehm of his constitutional right to be free
2 from unreasonable force. 18 U.S.C. § 242. Count Two alleged he
3 knowingly made a false entry in a record and document with the intent
4 to impede, obstruct, or influence an investigation of a matter within
5 the jurisdiction of the Federal Bureau of Investigation. 18 U.S.C. §
6 1519. Following the indictment, the United States began providing
7 discovery in accordance with Federal Rule of Criminal Procedure 16(a).
8 Between August of 2009 and March of 2010, the United States disclosed
9 five documents that set forth or described Mr. Fredericks' opinions
10 regarding the content of the video recordings. Other documents may
11 have referred to Mr. Fredericks, but the following documents appear to
12 be the ones that set forth or described his opinions.

13 The first document the United States disclosed was Mr.
14 Fredericks' 2006 report. Disclosure was made on August 3, 2009. The
15 2006 report is the one in which he opined the video recordings do not
16 depict the defendant using his baton against Mr. Zehm until
17 approximately one minute thirteen seconds into the confrontation. The
18 FBI Special Agent and the AUSA challenged this conclusion at the
19 meeting that took place on March 8, 2007.

21 The second document the United States disclosed was a document
22 that is entitled "United States' Addendum to First & Second Notice of
23 Initial Disclosures of Expert Witnesses & Testimony" (hereinafter
24 "Addendum") (ECF No. 56). Disclosure was made on September 22, 2009.
25 The Addendum summarized the testimony the United States expected its
26 experts to give at the defendant's trial. The Addendum attributed a

1 number of opinions to Mr. Fredericks. The following was one of them:

2 Immediately after the Zip Trip security video shows Thompson
3 appearing to strike Zehm with his baton for the first time,
4 dispatch broadcasted that the complainant was not sure that
5 Zehm had taken any of her money. This dispatch occurred
6 before Thompson strikes Zehm a second time with another
overhand, up and down, baton strike.

7 (Addendum at 3.) The Addendum refers to a broadcast from a
8 dispatcher. The broadcast began at 18:26:12 and ended at 18:26:16.
9 Even knowing this, the Addendum is difficult to interpret. It is
10 susceptible of more than one interpretation. For example, it could be
11 read to indicate the United States expected Mr. Fredericks to testify
12 the defendant twice struck Mr. Zehm with overhand, up and down, baton
13 strikes before 18:26:16.

14 The third document the United States disclosed was Mr.
15 Fredericks' 2007 report. Disclosure was made on September 29, 2009.
16 Mr. Fredericks prepared his 2007 report after meeting with the FBI
17 Special Agent and the Assistant United States Attorney on August 3,
18 2007. The 2007 report is the one in which Mr. Fredericks opined the
19 defendant's baton is not visible in an image that is stamped 18:24:11
20 PST (18:26:14 on the convenience store clock).

21 The fourth document the United States disclosed was a transcript
22 of Mr. Fredericks' grand jury testimony. Disclosure was made during
23 October of 2009. While Mr. Fredericks was testifying before the grand
24 jury, the AUSA asked him a number of questions concerning images that
25 record the opening seconds of the confrontation, including images that
26

1 are stamped 18:26:13 and 18:26:14. Mr. Fredericks answered
2 affirmatively when the AUSA asked, "And is the movement that we're
3 seeing here and as you described, is that consistent with the movement
4 of a forward overhand baton strike?"

5 The fifth, and final, document the United States disclosed was a
6 copy of the report the FBI Special Agent prepared after the meeting
7 with Mr. Fredericks on March 8, 2007. Disclosure was made on or about
8 March 1, 2010. This report was the one in which she said he agreed
9 "the images depicted in 18:26:14 and 18:26:15 were consistent with a
10 baton strike(s)," and the defendant "appeared to be using his baton in
11 a forward striking motion on at least two occasions prior to the
12 images depicting Zehm on his back holding the Pepsi bottle," and he,
13 Fredericks, "appeared to have missed these images during his initial
14 review of the video." The United States did not provide a copy of Mr.
15 Fredericks' 2009 New York testimony to the defendant. This was the
16 testimony in which he denied changing his mind "about what the video
17 showed," and in which he denied his 2006 report was incorrect.

18 Trial was scheduled to begin during June. As it turned out, the
19 United States appealed one of the Court's pretrial rulings.
20 Proceedings were stayed while the Ninth Circuit considered the appeal.
21 During the spring of 2011, the stay was lifted. Trial was scheduled
22 to begin during October.

23 On September 23, 2011, the defendant notified the United States
24 of his intent to call Michael Schott as an expert witness. The
25 defendant explained Mr. Schott disagreed with a number of opinions the
26

1 United States' experts were prepared to offer at trial. The United
2 States bitterly objected to Mr. Schott's proposed testimony. The
3 Court did not resolve the United States' objection prior to trial.
4 Jury selection began on October 12, 2011. At the end of the second
5 day of trial, the parties presented arguments in support of and in
6 opposition to the United States' objection to Mr. Schott's anticipated
7 testimony. During oral argument, an AUSA said:

8 The response has been, well, there's no prejudice.
9 Well actually there is, Your Honor. My, my expert, Mr.
10 Fredericks, has not even had the opportunity to review this.
11 He's in town today for the first time. I'm going to go
12 meet with him in a couple hours here to review it for the
13 first time.

14 That's in addition to the presentation of his other
15 testimony that we hope to complete tomorrow. And he leaves
16 the country for two weeks at noon tomorrow.

17 (Trial Transcript, Vol. 2, p. 168.) The Court overruled the United
18 States' objection at the beginning of the third day of trial.¹

19 The United States did not call Mr. Fredericks as a witness.
20 Instead, the United States relied upon other witnesses to interpret
21 the video recordings of the confrontation. One was Dr. Gill, the
22 human-factors expert. He used a "Baton/Taser Motion Reference Grid"

23 ¹The defendant alleges some of the AUSA's statements to the
24 Court were materially inaccurate. The United States has not
25 responded to the allegation, much less attempted to rebut it.
26 The Court need not determine whether the defendant is correct
because, in the end, the Court overruled the United States'
objection and allowed Mr. Schott to testify.

1 to help explain his opinions. (ECF No. 973, Ex. 3.) The exhibit had
2 been prepared by an FBI Special Agent based, in part, upon work that
3 Mr. Fredericks performed. The grid lists 13 baton "motions." At this
4 juncture, the first two are the most important. Dr. Gill said the
5 first strike is depicted in frames 68-70. (Trial Transcript, Vol. 5,
6 p. 785.) His interpretation of frame 69 was now more guarded. "I
7 don't know what the image is that you can see above Officer Thompson's
8 head in 69," he said. *Id.* at 811. "I can't tell you it's his hand,
9 but I know his hand is in that image, because of what happens in the
10 next subsequent image." *Id.* Nevertheless, Dr. Gill insisted frames
11 68-70 depict the first baton strike. He appears to have relied upon a
12 number of considerations. The defendant told investigators he struck
13 Mr. Zehm shortly after confronting him. Frame 68 is the first frame
14 in which the defendant is close enough to Mr. Zehm to strike him. In
15 frame 69, the defendant's head appears to move forward and down. *Id.*
16 at 777-781. Dr. Gill thinks the movement of the defendant's head is
17 consistent with the movement that would occur during a baton strike.²
18

19 Dr. Gill testified the second strike is depicted in frames 74-76.
20 *Id.* at 794-95. In reaching that opinion, he again relied upon a

21
22 ²In his 2008 report, Dr. Gill mentioned the observations of
23 percipient witnesses. They do not indicate Mr. Zehm fell when
24 struck the first time. (Report Re: Otto Zehm Investigation at
25 23.) Their observations seem to indicate Mr. Zehm was struck at
26 least twice before he fell down. At trial, Dr. Gill mentioned
the testimony of percipient witnesses, but he did not make this
specific point. (Trial Transcript, Vol. 5, p. 784.)

1 number of considerations. He began with the defendant's account of
2 the confrontation. Dr. Gill understood the defendant to say that
3 after the first strike, Mr. Zehm turned away from him and moved in an
4 easterly direction down the south aisle of the store. *Id.* at 780-81.
5 In frame 71, one can see the defendant and Mr. Zehm facing each other
6 in the south aisle. One can see the defendant's baton. He is holding
7 it at a 45° angle in front of him. Dr. Gill testified this was the
8 beginning of the second baton strike. In his opinion, the baton was
9 coming up. *Id.* at 781. The baton is also visible in frame 75. The
10 defendant is holding it in a horizontal position above his head. This
11 frame is stamped 18:26:16. (See, e.g., Fredericks' Rule 16
12 Demonstrative Response at 128.) Dr. Gill suggested the baton was
13 about to come down upon Mr. Zehm. (Trial Transcript, Vol. 5, p. 781.)
14 In Dr. Gill's opinion, the second strike was completed in frame 76.
15 This frame is stamped 18:26:16. *Id.* at 783. According to Dr. Gill,
16 other frames show Mr. Zehm falling backward at 18:26:16. *Id.* at 783-
17 84.
18

19 Another expert upon whom the United States relied to interpret
20 the video recordings was Robert Bragg. He is an expert in the field
21 of police procedures and use of force. He testified he had repeatedly
22 examined the still images and enhancements that were produced from the
23 security videos. (Trial Transcript, Vol. 4, p. 444.) He testified he
24 had been able to discern sufficient information from the security
25 videos in order to evaluate the defendant's conduct. *Id.* at 445. He
26 reached a number of conclusions that were unfavorable to the

1 defendant. Among other things, he concluded:

2 [The defendant] violated his training in the sense of
3 applying what appears to be lethal force due to the video
4 depiction of the high overhand strikes, that which I
5 mentioned before in terms of zero propensity forehead
6 contact, autopsy findings, witness statements, that lead me
to believe or conclude that there was lethal force applied.

7 *Id.* at 462. Mr. Bragg appears to have relied upon his own
8 interpretation of the video recordings in determining they depicted
9 "high overhand strikes." He did not cite Dr. Gill as his authority
10 for his interpretation of the images in question.

11 Besides presenting images of the confrontation (together with the
12 interpretations of experts who had studied the images), the United
13 States also presented testimony from persons who had observed the
14 confrontation. Russell Balow and his wife, Carrie Coyle-Balow were
15 outside the convenience store. Mr. Balow said he saw the defendant
16 approach Mr. Zehm inside the store. He said the defendant stopped
17 very briefly -- "[m]aybe a second . . . [m]aybe two" -- when he was
18 six to eight feet from Mr. Zehm; at which point the defendant's mouth
19 moved, as though he were speaking to Mr. Zehm, though Mr. Balow could
20 not hear what he said. (Trial Transcript, Vol. 6, pp. 1155, 1159.)
21 Mr. Balow said he saw the defendant hit Mr. Zehm twice with his baton
22 shortly thereafter. Both strokes were "over hand hits." *Id.* at 1156.
23 The first stroke grazed the right side of Mr. Zehm's head and landed
24 on his right shoulder. *Id.* at 1155. The second stroke also landed on
25 his right shoulder. *Id.* at 1156. Ms. Coyle-Balow's testimony was
26

1 similar. She, too, saw the defendant approach Mr. Zehm. She saw the
2 defendant stop momentarily: "less than" two seconds. *Id.* at 1171.
3 After the defendant stopped, his mouth moved. Ms. Coyle-Balow thought
4 he said something, but she could not hear the words. *Id.* at 1171-72.
5 Shortly thereafter, the defendant struck Mr. Zehm with his baton. *Id.*
6 at 1172-74. She did not see where the baton hit Mr. Zehm. *Id.* at
7 1179. She saw the defendant raise his baton a second time, and she
8 saw it come down, but she did not see it hit Mr. Zehm. *Id.* 1180.

9 Russell Balow and Carrie Coyle-Balow observed the confrontation
10 from a vantage point outside the convenience store. A number of
11 persons observed the confrontation from vantage points inside the
12 store. One was Dustin Balam:

13 A. I saw the officer run around and then clap Zehm on
14 the shoulder and then Zehm turned around and then
15 the officer struck Zehm once.³

16 Q. Did you see what area he struck him?

17 A. Looked like the shoulder.

18 Q. And what did he strike him with?

19 A. A baton.

20 Q. And did you see the officer use the baton more
21 than one time?

22 A. I did.

23 Q. How many times?

24 A. Probably two to four times.

25 Q. Can you describe for us exactly how he used the
26 baton?

A. Overhead strikes. He hit him in the shoulder and

³By "clap Zehm on the shoulder," Mr. Balow meant touch him on the shoulder. (Trial Transcript, Vol. 5, p. 877.)

1 then as Zehm was stumbling backwards, hit him like
2 in the side of the leg and then in the back again.

3 Q. Okay. Did you ever hear the officer say anything?

4 A. Um, not until they were on the ground. Where Zehm
5 was laying on his back and the officer was on top
6 of him.

7 Q. What did the officer say?

8 A. "Drop the pop bottle."

9 (Trial Transcript, Vol. 5, pp. 867-68.)

10 The United States presented testimony from other persons who
11 observed the confrontation from vantage points inside the convenience
12 store. One of them was Michael Dahl. State and federal investigators
13 had interviewed Mr. Dahl on separate occasions during 2006. On both
14 occasions, he told investigators the defendant commanded Mr. Zehm to
15 "drop the pop," and when Mr. Zehm failed to do so, the defendant
16 struck him. (Trial Transcript, Vol. 4, p. 602.) The United States
17 thought Mr. Dahl's initial statement was inaccurate because, in the
18 United States' opinion, he had not seen the first baton strike. An
19 Assistant United States Attorney and an FBI Special Agent showed Mr.
20 Dahl an image that, according to them, depicted the first baton
21 strike. *Id.* at 610. The image is stamped 18:26:14. After listening
22 to the United States' interpretation of the image, Mr. Dahl decided he
23 had not seen the first baton strike. He decided Mr. Zehm must have
24 been lying on the ground when he heard the defendant say, "Drop the
25 pop." *Id.* at 596.

26 During cross examination, one of the defendant's attorneys asked
Mr. Dahl a number of questions about his revised recollection of the

1 confrontation. The attorney showed Mr. Dahl the image the FBI Special
2 Agent and the AUSA had presented to him prior to trial:

3 Q. Is this what the Government told you was the first
4 baton strike you didn't see?

5 A. Yes.

6 Q. Did the Government ever tell you that they had
7 this and [sic] analyzed by the FBI forensic
laboratory?

8 A. No.

9 Q. Did they ever tell you that this was a potential
light that's in the window the Zip Trip?

10 A. Potential light?

11 Q. Yes. That's not a baton strike at all. They ever
tell you that?

12 A. They never told me.

13 Q. But that is, indeed, what the Government showed
14 you to convince you you didn't see the first baton
strike, isn't it?

15 A. Well, yes, I guess.

16 *Id.* at 610.

17 After the United States rested, the defendant presented evidence
18 of his own. One of the witnesses who testified for the defendant was
19 Michael Schott, an expert in interpreting M-JPEG images. He discussed
20 an image that is stamped 18:26:14. This is the image Dr. Gill
21 designated as frame 69. Mr. Schott used a different numbering system,
22 but the image is the same. Counsel for the defendant wanted to know
23 whether one can see the defendant's hand, arm, or baton in the image.
24 Mr. Schott explained why, in his opinion, one cannot see them. (Trial
25 Transcript, Vol. 10, pp. 2178-93.)
26

The methodology Mr. Schott used to form his opinion was different
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1 than the methodology Dr. Gill used. Dr. Gill's methodology had
2 deductive characteristics. He studied the defendant's account of what
3 had occurred and the accounts of the percipient witnesses. Based upon
4 the various accounts (especially the defendant's), he made assumptions
5 about what must have occurred. He relied upon those assumptions to
6 interpret the content of video images. (Trial Transcript, Vol. 5, p.
7 778-81.) Mr. Schott used a different methodology. Mr. Schott's
8 methodology had inductive characteristics. Instead of relying upon
9 external information in order to determine the content of an image, he
10 began with the image itself. Put somewhat differently, he used the
11 image to interpret the image rather than using external information to
12 interpret the image.

13 Mr. Schott's inductive methodology guided his analysis of the
14 image that, in Dr. Gill's opinion, depicted the first baton strike.
15 This is the image Dr. Gill designated as frame 69. There is a white
16 spot in the image. Mr. Schott was asked to determine, if possible,
17 whether the spot depicts the defendant's hand. Mr. Schott enlarged
18 the image to the point he could count individual pixels. He
19 calculated the pixel size of the white spot (an unknown object), and
20 he compared it with the pixel size of the defendant's head (a known
21 object). Based upon the comparison, Mr. Schott was able to determine
22 the white spot was two-thirds the size of the defendant's head. If
23 the spot were a three-dimensional object, it would be "the size of a
24 cantaloupe or bigger." (Trial Transcript, Vol. 10, pp. 2184-85.) In
25 other words, it was too big to be a hand. *Id.*
26

1 Mr. Schott also used his image-centered approach to challenge Dr.
2 Gill's conclusion that the first baton strike is depicted in frame 69.
3 Dr. Gill placed great weight upon the fact the defendant's head
4 appears to move forward and down in frame 69. Mr. Schott testified
5 frame 69 is deceptive; that the defendant didn't really move forward
6 and down. He opined the movement one "sees" in the images is not real
7 movement. It is a type of distortion that is inherent in time-lapse
8 video recordings. (Trial Transcript, Vol. 10, pp. 2193-97.)

9 The defendant testified. During cross examination, an Assistant
10 United States Attorney showed him a number of images. They included
11 ones that, in Dr. Gill's opinion, depicted the first baton strike.
12 Dr. Gill testified the first strike is depicted in frames 68-70.
13 (Trial Transcript, Vol. 5, p. 738.) Each of those images has the time
14 stamp 18:26:14. In Mr. Fredericks' opinion, one cannot see a baton in
15 any of those frames. Frame 71 is stamped 18:26:15. Everyone agrees a
16 baton is visible in that image. The defendant is holding it at a 45°
17 in front on himself. The AUSA asked:

18
19 Q. From frame number 68 through frame number 71, does
20 that reflect the first baton strike that you
21 delivered at Mr. Zehm? . . .

22 A. I believe frame 71 accurately depicts the first
23 strike.

24 Q. Delivery of the first strike.

25 A. Yes.

26 Q. Correct?

A. I believe so.

Q. Impact of the first strike?

A. Yes. Yes.

1
2
3

Q. And that's [frame number 71] the first -- that's the completion of your baton strike, which was at the first quarter of the second 18:26:15, correct?

A. Well, the baton is in an upright position, so it's not a completion of a strike.

Q. Oh, you're saying that that's the delivery, where you have the still photograph of the baton?

A. I can't give you that conclusion based on the video. This is one of the reasons I didn't watch the video when I gave the statement. It's confusing.

Q. It's confusing?

A. Yes, it's confusing.

(Trial Transcript, Vol. 12, pp. 2657-59.)

On October 31st, the Court read its final instructions to the jury and counsel delivered their closing arguments. The jury returned verdicts of guilty on both counts on November 2nd. Neither side had proposed special interrogatories for the jury to complete during its deliberations, so there is no way to determine which of the defendant's acts the jury relied upon in finding him guilty. It is possible the verdicts were based, in whole or in part, upon Dr. Gill's testimony concerning the first two baton strikes.

Approximately one month after the jury returned its verdicts, the Court and counsel for the United States received a letter from an attorney who had been retained by Mr. Fredericks. The attorney advised the Court that Mr. Fredericks had informed him the United

1 States' summary of his expected testimony misrepresented his opinions
2 concerning the video recordings. A copy of the letter was provided to
3 the defendant's attorneys. The letter set in motion an extended chain
4 of events. Among other things, the parties jointly interviewed Mr.
5 Fredericks, and then they took his deposition. The United States
6 presented rebuttal evidence, and Mr. Fredericks responded to it.

7 Much of the focus of the post-trial discovery process has been
8 upon the meetings that occurred during March and August of 2007. At
9 the March meeting, Mr. Fredericks discussed a number of images with an
10 Assistant United States Attorney and an FBI Special Agent. (Grant
11 Fredericks' Proffer (ECF No. 1009) at 7-8.) In images that are
12 stamped 18:26:12, 18:26:13, and 18:26:14, one can see a white spot and
13 a dark line. Mr. Fredericks says the AUSA was convinced the white
14 spot and dark line are the defendant's hand and baton. Mr. Fredericks
15 told the AUSA he was mistaken. Mr. Fredericks says he explained the
16 white spot was produced by a vehicle headlight and the dark line is a
17 compression artifact. Indeed, according to Mr. Fredericks, one cannot
18 see a baton in images that are stamped 18:26:12, 18:26:13, and
19 18:26:14. By contrast, a baton can be seen in an image that is
20 stamped 18:26:15. However, the image of the baton is not blurred.
21 Mr. Fredericks says he explained the phenomena of "motion blur" to the
22 AUSA and to the FBI Special Agent. If an object is moving while it is
23 being recorded, especially if it is moving quickly, the image of the
24 object likely will appear blurred in the recording. Thus, a blurred
25 object in a recording suggests the object was moving when it was
26

1 recorded. Conversely, the absence of motion blur suggests the object
2 was not moving or was moving slowly when it was recorded. According
3 to Mr. Fredericks, the baton one can see at 18:26:15 is not blurred by
4 movement. In Mr. Fredericks' opinion, the absence of motion blur
5 suggests the baton was not moving quickly.

6 Mr. Fredericks says he repeatedly rejected the AUSA's assertion
7 that images which are stamped 18:26:14 and 18:26:15 show the defendant
8 striking Mr. Zehm with his baton. At times, the meeting became
9 contentious. Eventually, says Mr. Fredericks, the AUSA approached the
10 issue of baton strikes from a different direction. "After some
11 discussion, . . . [The AUSA] asked if I could state that Thompson did
12 not strike Zehm at 18:26:14 and 18:26:15." (Fredericks' Proffer at
13 16.) Mr. Fredericks says he responded in the negative. "Not only can
14 the video not show forward motion of the baton, it clearly cannot be
15 used to prove that Thompson did not strike with the baton"

16 *Id.* Mr. Fredericks says he conceded the defendant's movements, as
17 recorded in images at 18:26:14 and 18:26:15, are "'consistent with a
18 number of possibilities.'" *Id.* at 21. The possibilities include, but
19 are not necessarily limited to, "a 'swinging motion of a baton'." *Id.*

20 As explained above, an FBI Special Agent prepared a written
21 report summarizing her perception of the discussion that occurred
22 during the March 7th meeting. Mr. Fredericks has read her report. He
23 says parts of it are inaccurate:
24

25 And I tried to be clear that my testimony was only that a
26 baton could not be seen, but that then, that one motion at
18:26:14 could be consistent with a swinging motion.

1

2 . . . But not the subsequent images that we have here.

3

4 And in fact I was very specific that there's no evidence of
5 motion with the baton because there's no motion blur. He
6 could just as easily be holding the baton as he's moving
7 forward.

8 (Deposition of Grant Fredericks (ECF No. 911) at 127).

9 The next meeting took place on August 3, 2007. Mr. Fredericks
10 says they again discussed the phenomena of motion blur:

11 . . . I believe it was the second meeting, where I offered
12 to do a reenactment.

13

14 . . . where I asked [the AUSA] to stand up and take the
15 position of Mr. Zehm and I took the position of Officer
16 Thompson, and I demonstrated what the video shows the baton
17 position to be in.

18

19 And that we cannot infer motion from that. So all we can
20 say is that, here's the baton. A number of things could be
21 happening. Officer Thompson may be swinging it.

22

23 But as I said, that swinging motion would have to be at the
24 kind of apex of the motion, if that's the correct word,
25 where the baton is back and as it's about to go forward,
26 where it's not in a swinging motion, because we would see
motion blur.

27

28 So I said, it may be that he's swinging at him. The video
29 doesn't, we can't use the video to say that and therefore
30 that is not my opinion. My opinion is simply, that's the
31 baton and it's in the air.

32 (Fredericks' deposition at 46-47.)

STANDARD

The United States has a duty under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to provide favorable evidence to the defendant. *United States v. Blanco*, 392 F.3d 382, 387 (9th Cir.2004). Not only must a prosecutor disclose favorable evidence of which he personally is aware, but also he must ask others who are involved in the prosecution whether they are aware of any favorable evidence. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In order to establish a due process violation, the defendant must prove three things: (1) the disputed evidence is favorable to him, either because it is exculpatory or because he could use it to impeach a witness; (2) the United States suppressed the evidence; and (3) he has suffered prejudice as a result. See *United States v. Kohring*, 637 F.3d 895, 901 (9th Cir.2011) (internal quotation marks and citations omitted).

FINDINGS OF FACT

Conflicting accounts of the two 2007 meetings have emerged. Mr. Fredericks' account is set forth in his deposition and in his proffer. The United States' account is set forth in two declarations that have been submitted by an FBI Special Agent. She maintains Mr. Fredericks admitted, during their first meeting, that some of the defendant's

1 movements during the opening seconds of the confrontation are
2 consistent with baton strikes. In addition, she maintains he admitted
3 he did not accurately interpret images that record the opening seconds
4 of the confrontation. However, she does not categorically deny all of
5 Mr. Fredericks' allegations. In particular, she does not appear to
6 deny he pointed out the presence of compression artifacts and
7 explained their significance. Nor does she appear to deny he
8 discussed the phenomena of motion blur and explained its significance.
9 Nor does she appear to deny he provided a demonstration suggesting
10 certain frames depicting the defendant' baton may be interpreted in an
11 exculpatory manner.

12 Having reviewed the record as a whole, the Court finds Mr.
13 Fredericks expressed a number of opinions to the FBI Special Agent and
14 to the Assistant United States Attorney at the March 8th meeting. At
15 a minimum, he said they had mistakenly interpreted a white spot and a
16 dark line as the defendant's hand, arm, and baton. He said he could
17 not see a baton in images that are stamped 18:26:12, 18:26:13, and
18 18:26:14. He said the images that are stamped 18:26:14 do not depict
19 the defendant swinging his baton at Mr. Zehm, although he conceded the
20 images in question are consistent with a swinging motion. Finally, he
21 explained the phenomena of motion blur.

22 The FBI Special Agent's report concerning the March 8th meeting
23 does not contain all of the opinions Mr. Fredericks expressed. The
24 most persuasive explanation for the incompleteness of the FBI Special
25 Agent's report is that it was the product of an innocent
26

1 misunderstanding. Mr. Fredericks' opinions are nuanced. He is
2 willing to concede a number of the disputed images are consistent with
3 a baton in motion. Nevertheless, in his opinion, the fact an image is
4 consistent with a moving baton does not mean the defendant was
5 swinging the baton, much less striking Mr. Zehm. A reasonable person
6 could fail to appreciate the distinction drawn by Mr. Fredericks.

7 On August 3, 2007, Mr. Fredericks again met with an FBI Special
8 Agent and an Assistant United States Attorney. He provided a
9 demonstration showing why, in his opinion, images of the defendant's
10 baton which lack motion blur reasonably can be interpreted to indicate
11 he was moving forward with the baton in his hand rather than swinging
12 it. The FBI Special Agent and the AUSA failed to note the exculpatory
13 value of the demonstration. It is possible Mr. Fredericks did not
14 express himself clearly. It is also possible the FBI Special Agent
15 and the AUSA mentally "blocked out" those parts of his comments that
16 were inconsistent with their theory of the confrontation between the
17 defendant and Mr. Zehm.
18

19 On May 13, 2009, Mr. Fredericks testified before the grand jury.
20 Some of his answers were very subtle. A reasonable person could miss
21 the distinctions he made. For example, an Assistant United States
22 Attorney posed a question concerning frame 71 which reflected Dr.
23 Gill's interpretation of that frame:

24 Q. And we know from reviewing Camera Angle No. 1 that
25 the baton is caught after the first baton strike,
26 and it's caught in an upward strike position with
forward movement by Officer Thompson at

1 approximately 18:26:15; is that correct?

2 A. Yes. There's a number of images that show the
3 baton in the air at that time, yes.

4 Fredericks Grand Jury Testimony at 38. Mr. Fredericks' answer
5 reflects the nuanced nature of his analysis. He acknowledged there
6 are "images that show the baton in the air." Nevertheless, he did not
7 ratify Dr. Gill's and the AUSA's interpretation of frame 71. That is
8 to say, he declined to agree frame 71 depicts the defendant swinging
9 his baton at Mr. Zehm.

10 On May 22, 2009, Mr. Fredericks testified in a federal criminal
11 case in the State of New York. The questions that AUSA Skotko asked
12 suggest one of two things: either she had a copy of the FBI Special
13 Agent's report concerning the March 2007 meeting with Mr. Fredericks,
14 or she had been apprised of the report's contents. Otherwise, how
15 would she have known to assert, "[Y]ou changed your mind about what
16 the video showed?" and "[Y]our initial report that you gave to the
17 Spokane Police Department, that was incorrect, wasn't it?" Those
18 questions reflect the United States' perception of Mr. Fredericks'
19 statements during the March 2007 meeting.

20 During oral argument on August 31, 2012, one of the Assistant
21 United States Attorneys who was involved in the prosecution of Karl
22 Thompson acknowledged he was aware of Mr. Fredericks' New York
23 testimony. The AUSA seemed to acknowledge he obtained a transcript of
24 Mr. Fredericks' New York testimony prior to Mr. Thompson's trial.
25 Presumably, then, the AUSA was aware of Mr. Fredericks' answers to
26 AUSA Skotko's questions. When she accused Mr. Fredericks of changing
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1 his mind about what the convenience store video showed, he said, "No.
2 That's not true at all." And when she asserted his 2006 report was
3 incorrect, he said, "No. . . . No, not at all." Those answers
4 reflected Mr. Fredericks' thinking on May 22, 2009. At least as of
5 that date, he did not think he had changed his mind about what the
6 video recordings showed. Nor did he think his 2006 report was
7 incorrect. This was contrary to the views that were attributed to him
8 in the report the FBI Special Agent prepared during March of 2007.
9 Mr. Fredericks' answers in the New York trial put the United States on
10 notice in the Thompson case that it had not fully understood him.

11 **ANALYSIS**

12 A. Favorable Evidence

13 The defendant must demonstrate he was deprived of favorable
14 evidence. *Kohring*, 637 F.3d at 901. Evidence is favorable if it
15 suggests he did not commit the crime with which he is charged, or if
16 he can use the evidence to undermine the credibility of one of the
17 United States' witnesses. See *id.* In order to determine whether Mr.
18 Fredericks' opinions are favorable to the defendant in either sense of
19 the word, it is necessary to consider the United States' theory of the
20 case. One of its allegations was the defendant abruptly attacked Mr.
21 Zehm with his baton without having an objective basis to fear for his
22 safety. Another of its allegations was the defendant gave
23 investigators a false account of his confrontation with Mr. Zehm. The
24 United States relied heavily, but by no means exclusively, upon its
25 experts' interpretations of the security videos in order to prove
26

1 those two allegations.

2 Mr. Fredericks would have acted as a counterbalance to Dr. Gill
3 had he testified. It is useful to begin with frame 69. This frame is
4 stamped 18:26:14. It is one of the images Mr. Fredericks discussed
5 with an Assistant United States Attorney and an FBI Special Agent on
6 March 8, 2007. It is the image that shows the white spot and the dark
7 line. Dr. Gill mentions this frame on pages 21, 22, 25, and 26 of his
8 report of January 31, 2008. At the outset, Dr. Gill says, "When
9 considered in light of all the evidence, Camera 1, jpg 69 shows
10 Thompson at the western end of the entrance into the southern most
11 aisle, with the baton in his right arm, with his right arm in a near
12 vertical position." (Gill report at 22.) Dr. Gill qualified that
13 statement to some extent. "[O]ne cannot say with a high degree of
14 probability," he wrote, "that the image captures Thompson's right arm
15 holding the baton above his head." *Id.* And he added, "[T]he baton
16 cannot be reliably seen in the single image of jpg 69." *Id.* Those
17 were not the last comments in his report concerning the baton. On
18 page 25, he wrote, "Zehm continues to back away as Thompson raises his
19 baton (Camera 1, jpg 69, 26:14 3/4.)" And on page 26, he wrote, "In
20 Camera 1, jpg 69, 26:14 3/4 Thompson has his arm fully elevated over
21 his head with his baton in hand[.]" At trial, Dr. Gill insisted his
22 2008 report does not say frame 69 depicts the defendant's hand. His
23 reading of the report is a permissible reading, but it is not the most
24 natural one. An objective reader easily could conclude that in 2008,
25 Dr. Gill thought he could see the defendant's hand, arm, and baton in
26

1 frame 69.

2 Had the defendant's attorneys been aware of Mr. Fredericks'
3 interpretation of frame 69, they would have been able to contrast his
4 interpretation with Dr. Gill's. Mr. Fredericks has consistently
5 denied one can see the defendant's hand, arm, or baton in frame 69.
6 In March of 2007, Mr. Fredericks said as much to an Assistant United
7 States Attorney and to an FBI Special Agent. Mr. Fredericks'
8 interpretation of the white spot and dark line has not changed. The
9 same cannot be said of Dr. Gill's interpretation of frame 69. A
10 plausible argument, perhaps even a strong argument, can be made his
11 interpretation has changed; that between 2008 and 2011 it became more
12 like Mr. Fredericks, though the two experts still disagree with
13 respect to what can be seen in frames 69-70. Mr. Fredericks adopted a
14 narrower interpretation; Mr. Gill a more expansive interpretation.
15 Which of them is correct? The fact Dr. Gill appears to have moved in
16 Mr. Fredericks' direction tends to validate Mr. Fredericks' caution.

17 Evidence suggesting Dr. Gill misinterpreted frames 68-70 would
18 have helped the defendant. Dr. Gill placed the first baton strike at
19 18:26:14. Consequently, he opined the defendant did not have time to
20 give the commands he claimed to have given before the first strike.
21 This suggested the defendant lied about his conduct. Mr. Fredericks
22 questioned Dr. Gill's interpretation of frames 69-70. He thought Dr.
23 Gill was reading far more into them than was justified. Had the
24 jurors heard Mr. Fredericks' views, they may have been less inclined
25 to accept Dr. Gill's opinion concerning the first baton strike.
26

1 Having considered frames 69-70, it is appropriate to turn to
2 frames 71-76. In frame 71, the defendant can be seen holding a baton
3 at a 45° angle. Dr. Gill testified he thought the baton was coming up
4 in preparation for the second strike. Dr. Gill reached this opinion
5 despite the fact the image of the baton in frame 71 does not appear to
6 be blurred. Mr. Fredericks explained to an Assistant United States
7 Attorney and an FBI Special Agent at their 2007 meetings that the
8 absence of motion blur is significant. It tends to suggest the baton
9 was either motionless or moving slowly. Furthermore, Mr. Fredericks
10 provided a demonstration. He showed that blur-less images of the
11 baton may indicate the defendant was simply moving forward with the
12 baton in his hand rather than swinging it. Had the United States
13 disclosed Mr. Fredericks' teaching concerning motion blur, especially
14 the absence of motion blur, the defendant's attorneys would have been
15 in a much better position to challenge Dr. Gill's interpretation of
16 frame 71. They plausibly could have argued that frame 71 was not the
17 beginning of a baton strike.
18

19 Frame 71 played a significant role in the United States' cross
20 examination of the defendant. An AUSA attempted to get him to concede
21 the first strike was completed in frame 70. He refused to make that
22 concession. The AUSA then turned to frame 71. This is the one in
23 which the defendant can be seen holding his baton in front of him at
24 a 45° angle. Initially, the defendant said this frame depicted the
25 delivery his first baton strike; then he said it depicted the impact
26 of the first strike; and then, when he reexamined the frame and

1 realized it depicts him holding his baton in an upright position, he
2 said he was unsure whether it depicted the first strike. Mr.
3 Fredericks would have explained why it was not unreasonable for the
4 defendant to reject the United States' interpretation of frames 70 and
5 71. Mr. Fredericks could have physically demonstrated to the jury why
6 frame 71 may indicate the defendant was moving forward while holding
7 his baton at a 45° angle rather than swinging his baton at Mr. Zehm.
8 If that's what frame 71 depicts, then its possible the first baton
9 strike did not occur until after frame 75. The latter frame is
10 stamped 18:26:16. This would put the first strike two seconds later
11 than Dr. Gill posited. Two seconds may not seem like much, but in
12 this case, two seconds is significant.

13 Frame 75 differs from frame 71 in important respects. Frame 75
14 is stamped 18:26:16. It depicts the defendant holding a baton in a
15 horizontal position above his head. The image of the baton is not
16 blurred. Still, the position of the baton has changed. In 71, the
17 position is consistent with a baton being held in the ready position
18 by an officer who is moving forward. In 75, the position is
19 consistent with a baton that is about to be swung by an officer. It
20 is unlikely Mr. Fredericks' opinions would have dissuaded the jury
21 from accepting Dr. Gill's opinion that frame 75 is the beginning of a
22 baton strike. (Whether it was the first strike or the second strike
23 is a different matter).

24 It is difficult to assess the extent to which Mr. Fredericks
25 would have served as a counterbalance to Mr. Bragg. The United States
26

1 presented him as an expert in police practices and the use of force,
2 not as an expert in image analysis. Nevertheless, it is clear he
3 determined, based upon his own review of the video recordings, the
4 defendant administered high, overhand baton strikes to Mr. Zehm.
5 (Trial Transcript, Vol. 4, p. 462.) By contrast, it is unclear which
6 images Mr. Bragg relied upon to form that opinion. Perhaps he based
7 his opinion upon his interpretation of frames 68-70 and frames 74-76;
8 perhaps not. Since it is unclear which frames he relied upon, the
9 Court cannot say Mr. Fredericks would have served as a counterbalance
10 to Mr. Bragg with respect to the period between 18:26:14 and 18:26:16.

11 B. Suppression

12 It is not enough for the defendant to demonstrate he was deprived
13 of favorable evidence. He must show the United States suppressed it.
14 *Kohring*, 637 F.3d at 901. The defendant points to the favorable
15 opinions that were held by Mr. Fredericks; opinions that were never
16 disclosed to him. For example, in Mr. Fredericks' opinion, the white
17 spot and dark line in frame 69 are not the defendant's hand, arm and
18 baton. In his opinion, the images that are stamped 18:26:12,
19 18:26:13, and 18:26:14 do not show the defendant's baton. In his
20 opinion, blur-less images of the defendant's baton reasonably can be
21 interpreted to indicate the defendant was moving forward with the
22 baton in his hand rather than swinging it at Mr. Zehm.

24 The United States argues the defendant's attorneys should have
25 inferred from the discovery materials that Mr. Fredericks held
26 favorable opinions. The United States' argument has some merit, as

1 the defendant acknowledges. However, he maintains there is more here
2 than a mere failure to disclose favorable opinions. According to the
3 defendant, the United States knew or should have known the FBI Special
4 Agent's report concerning the March 8th meeting was inaccurate. The
5 defendant alleges the United States failed to correct an inaccurate
6 description of Mr. Fredericks' opinions.

7 In order to evaluate the competing arguments, one must return to
8 the FBI Special Agent's report. After reading it, an objective person
9 likely would reach a number of conclusions: An image that is stamped
10 18:26:14 depicts the defendant holding his baton. Mr. Fredericks
11 initially, but mistakenly, thought the baton was something other than
12 a baton. Mr. Fredericks agreed with the FBI Special Agent that images
13 which are stamped 18:26:14 and 18:26:15 are consistent with baton
14 strikes. Mr. Fredericks agreed the defendant used his baton in "a
15 forward striking motion" on at least two occasions prior to the point
16 in time when Mr. Zehm can be seen on his back. Finally, Mr.
17 Fredericks admitted he had failed to appreciate the significance of a
18 number of critical images during his initial review of the video.

19 The FBI Special Agent's description of Mr. Fredericks' analysis
20 is devastating. After reading her report, an objective person would
21 be inclined to doubt Mr. Fredericks' competence. The United States
22 never attempted to correct or clarify the FBI Special Agent's account
23 of the March 8th meeting. None of the other materials the United
24 States disclosed to the defendant prior to trial put him on notice her
25 account might be inaccurate. Instead, the United States let stand the
26

1 FBI Special Agent's report, even though the United States had reason,
2 after Mr. Fredericks' testimony in New York, to question whether her
3 report was entirely correct.

4 C. Prejudice

5 It is not enough for the defendant to prove he was deprived of
6 favorable evidence. Nor is it enough for him to prove the United
7 States suppressed it. He must also prove he suffered prejudice as a
8 result. *Kohring*, 637 F.3d at 901. The suppression of evidence by a
9 prosecutor is prejudicial when there is a reasonable probability that,
10 had the evidence been disclosed, the result of the trial would have
11 been different. *Smith v. Cain*, --- U.S. ----, 132 S.Ct. 627, 630, 181
12 L.Ed.2d 571 (2012) (internal punctuation and citation omitted). "A
13 reasonable probability does not mean that the defendant would more
14 likely than not have received a different verdict with the evidence,
15 only that the likelihood of a different result is great enough to
16 undermine confidence in the outcome of the trial." *Id.* at ----, 132
17 S.Ct. at 630 (internal punctuation and citation omitted).

18 Prejudice cannot be assessed in a vacuum. To the contrary, it
19 can be assessed only by considering what Mr. Fredericks would have
20 said at trial in light of what the United States was alleging. There
21 were two counts. Count One alleged, in essence, the defendant
22 willfully employed objectively unreasonable force throughout the
23 confrontation. Count Two alleged, in essence, the defendant made a
24 number of false statements to investigators about the confrontation.
25 The United States presented the jury with an enormous amount of
26

1 evidence, including the testimony of Dr. Gill. He said the defendant
2 struck Mr. Zehm multiple times, and he identified the images that, in
3 his opinion, corresponded with each strike. Dr. Gill and other
4 witnesses questioned the veracity of a number of statements the
5 defendant made to investigators on March 22, 2006. Consequently, the
6 jury could have relied upon any number of acts to find the defendant
7 guilty of Count One (willful use of excessive force), and the jury
8 could have relied upon any number of statements to find the defendant
9 guilty of Count Two (false statement). The problem is this: The jury
10 was not asked to specify which act(s) it relied upon to find the
11 defendant guilty of Count One, nor was the jury asked to specify which
12 statement(s) it relied upon to find the defendant guilty of Count Two.
13 Thus, the Court must assume the jury agreed the defendant administered
14 all of the strikes identified by Dr. Gill, and the Court must assume
15 the jury agreed each strike was unlawful.
16

17 At this juncture, only the first two strikes are at issue. Dr.
18 Gill testified the first strike is depicted in frames 68-70. If Dr.
19 Gill is correct, then it is unlikely the defendant had time to issue
20 the warning commands he claimed to have issued before striking. The
21 United States is convinced Dr. Gill is correct and the defendant lied.
22 As the United States observes, the jury was presented with
23 overwhelming evidence the defendant struck Mr. Zehm within seconds of
24 approaching him. The evidence included the defendant's admissions,
25 the testimony of persons who observed the confrontation, the video
26 recordings, and Dr. Gill's analysis of the relevant images.

1 Dr. Gill adopted an expansive interpretation of the images that
2 record the opening seconds of the confrontation. It is likely the
3 jury was influenced by his testimony. He is a well educated engineer
4 with extensive experience, and he had a coherent basis for his
5 interpretation. Furthermore, his interpretation of the disputed
6 frames appears to the untrained observer to depict precisely what the
7 observer thinks he's seeing. Nevertheless, Dr. Gill's interpretation
8 of the disputed frames remained just that: his interpretation. And
9 while his interpretation has strengths, it also has weaknesses. One
10 weakness of his interpretation is the poor quality of the images. Do
11 they actually reveal as much information as he claims? A second
12 weakness of his interpretation is an apparent change of mind. In
13 2008, he arguably thought he saw the defendant's baton in frame 69.
14 (He insists his statements in that regard were equivocal, but the text
15 of his report expresses more confidence than he is presently willing
16 to acknowledge.) By trial, he arguably had changed his mind. While
17 on the stand, he testified he did not see the baton in frame 69. Can
18 an objective observer have confidence in Dr. Gill's current
19 interpretation of frame 69 if, as appears to be the case, he over-
20 interpreted it when he first saw it? A third weakness of his
21 interpretation is it discounts the observations of at least two, and
22 possibly three, percipient witnesses. Russell Balow and Carrie Coyle-
23 Balow both testified the defendant stopped briefly and appeared to
24 speak before striking. Michael Dahl generally agreed with them until
25 the United States persuaded him he had not seen the first strike.
26

1 Mr. Fredericks would have helped the defendant's attorneys
2 illustrate the weaknesses of Dr. Gill's interpretation. Mr.
3 Fredericks has consistently maintained frame 69 does not depict the
4 defendant's hand, arm and baton. He has consistently maintained frame
5 69 does not show the defendant swinging his baton (though he is
6 willing to concede the image is consistent with such a motion). He
7 has consistently urged caution in interpreting frames 68-76. Had the
8 jury accepted his testimony, the jury might have been willing to
9 question whether the first baton strike occurred at 18:26:14. This
10 was essential to a successful defense. The video is very powerful.
11 It seems to show the defendant abruptly striking a retreating Mr.
12 Zehm. The defendant's principal means of negating the impression
13 created by the video was to persuade jurors the video does not tell
14 the whole story. This was the precise point Mr. Fredericks repeatedly
15 tried to make about the video, and there was external support for his
16 contention. Mr. Balow and Ms. Coyle-Balow both testified the
17 defendant paused as he approached Mr. Zehm and appeared to speak to
18 Mr. Zehm before he struck him. However, they could not hear what the
19 defendant said. Mr. Dahl did hear the defendant speak. Initially, he
20 told both state and federal investigators, in separate interviews, the
21 defendant commanded Mr. Zehm to "drop the pop" before striking. Mr.
22 Dahl's initial statements to investigators tended to corroborate the
23 observations of Mr. Balow and Ms. Coyle-Balow. Let us assume, then,
24 they were correct. Let us assume the defendant really did pause and
25 speak before striking. If so, then perhaps the opening seconds of the
26

1 confrontation between the defendant and Mr. Zehm were more complex
2 than the video seems to suggest. Perhaps more occurred during those
3 seconds than Dr. Gill and the other plaintiff's experts were able to
4 detect. Perhaps the defendant's account of what occurred is not as
5 farfetched as the United States claims.

6 The United States became convinced Mr. Dahl's initial statements
7 to state and federal investigators were mistaken because, in the
8 United States' opinion, he did not see the first baton strike. Thus,
9 according to the United States, the words he heard -- *i.e.*, "Drop the
10 pop" -- must have occurred after the first baton strike. The United
11 States may be correct. Let us assume a genuine issue exists with
12 respect to whether Mr. Dahl saw the first baton strike. Resolution of
13 the issue was of critical importance to both the United States and to
14 the defendant. How was it resolved? The United States took Mr. Dahl
15 aside and showed him images of the opening seconds of the
16 confrontation. The United States provided a partisan interpretation
17 of those images; convincing him he had not seen the first baton
18 strike. The defendant was not allowed to participate in the process.
19 By the time Mr. Dahl testified at the defendant's trial, his change of
20 mind was an accomplished fact. Presumably, his brain had restructured
21 its recollection of the confrontation so it now conformed to his new
22 understanding of the event.

24 The United States' interaction with Mr. Dahl and its failure to
25 disclose Mr. Fredericks' favorable opinions impaired the defendant's
26 ability to challenge the United States' theory of the opening seconds

1 of the confrontation. This placed the defendant at a disadvantage.
2 The disadvantage was mitigated, in part, by Michael Schott. As
3 explained above, he disagreed with Dr. Gill's interpretation of the
4 images that are stamped 18:26:14 (i.e., frames 68-70 using Dr. Gill's
5 numbering system). He was available to help the defendant's attorneys
6 prepare their cross examination of Dr. Gill. Beyond that, Mr. Schott
7 testified. He explained why, in his opinion, the white spot and the
8 dark line in the disputed image do not depict the defendant's hand,
9 arm, and baton. It appears Mr. Schott's testimony concerning frame 69
10 covered many of the points Mr. Fredericks would have made concerning
11 that frame. Thus, Mr. Schott's testimony mitigated the harm the
12 defendant suffered as a result of the United States' failure to
13 disclose Mr. Fredericks' favorable opinions.
14

15 Besides the mitigating impact of Mr. Schott, there is another
16 important consideration; namely, the sheer weight of the evidence
17 presented by the United States. Dr. Gill was an important part of its
18 case, but he was by no means the only part. Numerous persons observed
19 the struggle between the defendant and Mr. Zehm. At least three saw
20 the first baton strikes. Although their testimony was inconsistent in
21 some respects, and although their testimony supported the defendant's
22 account in some respects, they generally agreed he struck shortly
23 after confronting Mr. Zehm and he struck in manner that risked
24 inflicting serious injury. For example, Mr. Balow testified he saw
25 the defendant's first stroke graze the side of Mr. Zehm's head. Mr.
26 Balow's observation was supported by medical evidence. Then there are

1 the defendant's admissions. Although he denies intentionally striking
2 Mr. Zehm in the head, he has never denied intentionally and repeatedly
3 striking other parts of Mr. Zehm's body. To the contrary, he admitted
4 as much when he was interviewed in 2006, and he admitted as much when
5 he was cross examined by the United States at trial. Finally, there
6 is the assessment of police-practice experts. The United States asked
7 two of them to evaluate the defendant's conduct. They were sharply
8 critical of the decisions he made during the openings seconds of the
9 confrontation and, indeed, of the decisions he made throughout his
10 struggle with Mr. Zehm.

11 In sum, Dr. Gill's testimony was only one part of the United
12 States' case, and the United States' case against the defendant was
13 very strong. As a result, proving prejudice is a formidable task.
14 The defendant must show "that the favorable evidence could reasonably
15 be taken to put the whole case in such a different light as to
16 undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115
17 S.Ct. 1555. Undoubtedly, Mr. Fredericks would have helped the
18 defendant. It is possible the verdicts would have been different.
19 Nevertheless, having considered the record as a whole, the Court
20 concludes the likelihood of a different outcome is remote even
21 assuming the defendant discredited Dr. Gill's interpretation of the
22 opening seconds of the confrontation.
23

24 **RULING**

25 Some, but not all, of the 2006 confrontation between Karl
26 Thompson and Otto Zehm was recorded by the convenience store's

1 security cameras. Grant Fredericks is an expert in the interpretation
2 of time-lapse video recordings. Mr. Fredericks adopted a cautious
3 interpretation of the images that were recorded by the store's
4 security cameras. Some of his opinions are favorable to Mr. Thompson.
5 On at least two occasions, Mr. Fredericks discussed his opinions with
6 an FBI Special Agent and an Assistant United States Attorney. The
7 conversations did not go well. Perhaps Mr. Fredericks did not
8 communicate clearly; perhaps the Assistant United States Attorney and
9 the FBI Special Agent were not prepared to hear what he was saying.
10 In any event, a serious misunderstanding occurred. The opinions that
11 the United States attributed to Mr. Fredericks were incomplete and, in
12 a few instances, inaccurate. The defendant was misled by the United
13 States' description of Mr. Fredericks' opinions. The United States
14 did not intentionally mislead the defendant, but he was misled
15 nonetheless. This circumstance impaired his ability to rebut the
16 charges that are set forth in the Indictment.

18 The defendant alleges the United States deprived him of due
19 process of law in violation of the Fifth Amendment. He urges the
20 Court to vacate the jury's verdicts and either dismiss the Indictment
21 or order a new trial. He must prove three things in order to prevail:
22 (1) favorable evidence was withheld from him, (2) the United States
23 withheld it, and (3) he suffered prejudice as a result. *See Kohring*,
24 637 F.3d at 901. The defendant has proved two of the three things
25 that are necessary to establish a due process violation. Favorable
26 evidence was withheld from him, and the United States withheld it.

1 The issue, then, is prejudice. There is a possibility the verdicts
2 would have been different had the defendant known Mr. Fredericks'
3 opinions. However, the United States presented substantial evidence
4 in support of its allegations. The possibility of a different outcome
5 is not great enough to undermine confidence in the verdicts the jury
6 rendered. To the contrary, the verdicts are worthy of the public's
7 confidence. Consequently, the Court will not vacate the jury's
8 verdicts.

9 **IT IS HEREBY ORDERED:**

10 The defendant's "Motion to Dismiss the Indictment with Prejudice;
11 or Alternatively, Motion for a New Trial" (ECF No. 907) is **denied**.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to counsel.

14 **DATED** this 18th day of September, 2012.

15
16 s/ Fred Van Sickle
17 Fred Van Sickle
18 Senior United States District Judge
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